

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE FORMAL COMPLAINT)	
OF RICHARD SPINKS DBA GIGGLEBUGS, LLC)	
AGAINST DELMARVA POWER & LIGHT)	PSC DOCKET NO. 18-1194
COMPANY REGARDING THE DETERMINATION)	
OF A TARIFF RATE CATEGORY)	
(Filed November 8, 2018))	

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

DATED: September 24, 2019

MARK LAWRENCE
SENIOR HEARING EXAMINER

Table of Contents

I.	APPEARANCES	2
II.	PROCEDURAL HISTORY	3
III.	FACTS.....	4
IV.	DISCUSSION.....	7
V.	RECOMMENDATIONS.....	11

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE FORMAL COMPLAINT)	
OF RICHARD SPINKS DBA GIGGLEBUGS, LLC)	
AGAINST DELMARVA POWER & LIGHT)	PSC DOCKET NO. 18-1194
COMPANY REGARDING THE DETERMINATION)	
OF A TARIFF RATE CATEGORY)	
(Filed November 8, 2018))	

FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

I. APPEARANCES

On behalf of the Petitioner Richard Spinks, Managing Member, GiggleBugs Early Learning Center, LLC

On behalf of Delmarva Power & Light Company:
("Delmarva Power," "Delmarva," "DPL" or "the Company"):

By: LINDSAY B. ORR
ASSISTANT GENERAL COUNSEL

On behalf of the Delaware Public Service Commission Staff ("Staff" or "Commission Staff"):

By: JAMES McC. GEDDES, ESQ.
RATE COUNSEL

On behalf of the Division of the Public Advocate
("Public Advocate" or "DPA"):

By: REGINA A. IORII, ESQ.
DEPUTY ATTORNEY GENERAL

On behalf of Intervenor Clean Energy USA, LLC (“Clean Energy”)

By: ERIC J. WALLACE, ESQ.
GREENEHURLOCKER, PLC

II. PROCEDURAL HISTORY

1. On October 16, 2018, Petitioner Richard Spinks, Managing Member of GiggleBugs Early Learning Center, LLC (“GiggleBugs”) filed with the Delaware Public Service Commission (“Commission”) a formal complaint against Delmarva Power & Light Company alleging that Delmarva was violating its tariff by using “kWh draw” rather than “monthly usage” as the basis for determining Gigglebugs’ electric rate classification.¹ Delmarva answered the Complaint on December 5, 2018, denying GiggleBugs’ allegations.

2. The Delaware Division of the Public Advocate (“DPA”) filed a statutory Notice of Intervention on November 27, 2018. By PSC Order No. 9343 (February 14, 2019), I permitted Clean Energy USA, LLC to intervene.² The parties agreed to an Amended Procedural Schedule on March 26, 2019. After discovery, I held a Pre-Hearing Conference Call on July 23, 2019. I held an Evidentiary Hearing on July 31, 2019. I established a deadline of September 3, 2019, for simultaneous post-hearing briefs. The Applicant, Delmarva Power, the Public Advocate, and Clean Energy each timely filed post-hearing briefs. Commission Staff also participated in the evidentiary hearing.

¹ Transcript of 7/31/19 Evidentiary Hearing at 21. (Tr.-21) Testimony from the transcript of the Evidentiary Hearing will be cited herein as, for example “Tr-2”, meaning the testimony appears at page 2 of the transcript. Exhibits admitted into evidence at the Evidentiary Hearing will be referred to as “Exh.” and page number, for example, Exh. 1, p.2.

² See Letter dated July 29, 2019 filed in DelaFile clarifying name of Intervenor.

III. FACTS

3. On June 1, 2015, GiggleBugs opened for business.³ Delmarva Power assigned GiggleBugs to its Small General Service-Non Demand (“SGS-ND”) rate classification.⁴ The SGS-ND Tariff provision in effect on June 1, 2015, provided that it was available to “any Customer having a maximum monthly usage of less than 3,500 kWh...”⁵ If an SGS-ND customer’s kWh usage for any two (2) consecutive billing months exceeds 3,500 kWh, however, the customer is automatically transferred to Service Classification “MGS-S”, which is mandatory for any customer “having monthly usage of more than 3,500 kWh for 2 consecutive months,”⁶ beginning with the customer’s next succeeding billing month.⁷ SGS-ND customers automatically transferred to MGS-S must remain on MGS-S for at least twelve (12) billing months, even if their monthly usage in the succeeding months is less than 3,500 kWh.⁸ After the expiration of twelve (12) months, MGS-S customers may transfer back to SGS-ND as long as they have not used more than 3,500 kWh for any two (2) billing months within the twelve (12) months that they were on MGS-S service.⁹

³ Tr.-7.

⁴ *Id.*

⁵ Exh. 8, Delmarva Electric tariff, Service Classification “SGS-ND,” Small General Service-Non Demand Rate, Fourth Revised tariff Leaf No. 60, effective August 9, 2011 and filed in compliance with Order No. 8011 in Docket Nos. 09-414 and 09-276T on September 2, 2011. The tariff provides as follows:

This rate is available to any Customer having a maximum monthly usage of less than 3,500 kWh and desiring service at secondary voltage as defined in Section XI-I of the Rules and Regulations. Any Customer taking service under this service classification whose kWh usage for any 2 consecutive billing months is equal to or exceeds 3,500 kWh shall be automatically transferred to Service Classification “MGS-S” for at least 12 billing months, even though the Customer’s monthly usage in succeeding billing months may be less than 3,500 kWh. After such 12 billing months, at the Customer’s option, the Customer may be transferred back to this Service Classification “SGS-ND” provided that the Customer has not used more than 3,500 kWh for any 2 consecutive billing months within the most recent 12 billing months. (emphasis supplied)

⁶ Exh. 9, Delmarva Electric tariff, Service Classification “MGS-S,” Medium General Service – Secondary Rate, Fourth Revised tariff Leaf No. 62, effective August 9, 2011 and filed in compliance with Order No. 8011 in Docket Nos. 09-414 and 09-276T on September 2, 2011.

⁷ Exh. 8 at Fourth Revised Leaf No. 60.

⁸ *Id.*

⁹ *Id.*

4. On January 26, 2017, Delmarva Power transferred GiggleBugs from to SGS-ND to MGS-S because it no longer qualified for SGS-ND due to the amount of its use.¹⁰ In addition to the monthly usage requirement, MGS-S service also contains a demand charge for “peak period usage” based on a customer’s summer (June through September) maximum demand of less than 300 kW, while the SGS-ND Service does not contain a demand charge.¹¹

5. In the Spring of 2017, Clean Energy, one of Delaware’s largest installers of solar panels, visited GiggleBugs.¹² In deciding whether or not to install solar panels, Mr. Spinks reviewed Delmarva Power’s SGS-ND and MGS-S tariff provisions.¹³ Observing that GiggleBugs could return to SGS-ND service if usage was less than 3,500 kWh for twelve (12) consecutive months, and calculating that GiggleBugs could “create up to 110% of our usage” if solar panels were installed, Mr. Spinks decided to install solar panels at GiggleBugs.¹⁴

6. The solar panels and Delmarva Power’s net metering equipment were installed at GiggleBugs’ premises in September 2017.¹⁵ Thus, “GiggleBugs became a solar customer and began taking service under the Net Energy Metering (“NEM”) rider to Delmarva Power’s electric tariff effective with the September 2017 billing.”¹⁶ “The NEM rider requires Delmarva Power to provide credit to customers who generate energy that goes back to Delmarva Power’s system: “During any billing period when a customer-generator produces more energy than that consumed by the Customer, the Company will credit the Customer in kWh’s ...”¹⁷

¹⁰ Tr-7,47.

¹¹ Exh. 9

¹² Tr. at 27-28, 38.

¹³ Tr.-8.

¹⁴ *Id.* at 8-9.

¹⁵ *Id.* At 10. *See also* Exh. 14, Delmarva Power’s Net Metering tariff.

¹⁶ Delmarva Power Brief, p.4 (*citing* Tr. 47-48).

¹⁷ Delmarva Power Brief pp. 4-5 (*citing* Exh. 4, Tr.-53)

7. Immediately after installation, Giggiebugs sought a waiver of the twelve (12) month period from remaining on the MGS-S service classification but was told by Delmarva that a waiver was not possible according to the terms of the SGS-ND and MGS-S tariffs because of its “draw.”¹⁸

8. GiggieBugs remained subject to the MGS-S service classification until September 2018 when Delmarva Power transferred it to the SGS-ND service classification.¹⁹ GiggieBugs desires to stay on SGS-ND and avoid being transferred to MGS-S because MGS-S includes a demand charge and SGS-ND does not.²⁰ GiggieBugs estimates the difference between the two (2) service classifications at \$5,000 per year.²¹ It is undisputed that GiggieBugs paid significantly higher electric bills when it was on MGS-S in 2017 and early 2018, compared to its electric bills in for the remainder of 2018 and 2019 while on SGS-ND.²²

9. The “draw” figure (or “total usage” figure as Delmarva refers to it in its Brief), which Delmarva uses as the basis to determine a net metering customer’s eligibility for SGS-ND, does not currently print on GiggieBugs’ Delmarva bill.²³ Each month, GiggieBugs emails Delmarva Power to obtain its draw figure for that month.²⁴ In its Brief, Delmarva Power has offered to “upgrade” GiggieBugs’ “older” equipment (at no cost to Giggiebugs) so that Giggiebugs can receive its draw or total usage, or delivered kWh from Delmarva Power’s system.²⁵ Including Giggiebugs, only six (6) customers currently have this dated equipment.²⁶ By contrast, the “usage”

¹⁸ Tr. 10-14.

¹⁹ Exhibit 7.

²⁰ Tr. 15:7-18:3; 31.

²¹ Tr. 17-18. At the hearing, Mr. Spinks testified that “I have not suffered any financial harm.” (Tr. 24-25) I think that it is more accurate to say that he “has not yet suffered any financial harm.”

²² Exhibit 7.

²³ Tr.- 53-54; Exhibits 3-6.

²⁴ *Id.*

²⁵ Delmarva Power Brief, p. 7.

²⁶ Tr.-65.

figure is presented on Gigglebugs' Delmarva Power bill, although Delmarva refers to it as its "net billed usage" in its Brief and refers to the draw issue as "irrelevant."²⁷ The usage Gigglebugs itself uses is contained on its bill each month, labeled "Current month usage kWh."²⁸

10. This Tariff interpretation issue affects not only Gigglebugs but also other Delmarva Power customers with the SGS-ND or MGS-S Service Classifications, as well as potential customers in the Delaware solar market.²⁹ Clean Energy testified that there are other customers awaiting a decision resolving these tariff interpretation issues before making an investment in a solar generating facility and participating in net metering under with Delmarva Power.³⁰

11. By way of background, "GiggleBugs is an Early Learning Center with 26 staff members serving 143 children in Millsboro, Delaware. The business is open and operating from 6:30 a.m. until 5:30 p.m. Monday through Friday, year-round, and the facility expanded [in June 2018] from 8,500 square feet to 9,500 square feet. ... [T]he facility also has a kitchen with a commercial refrigerator and freezer, two [residential] stoves, and a microwave."³¹ Gigglebugs' outdoor lighting and heating/air conditioning systems are set on timers.³²

IV. DISCUSSION

12. I first find that Delaware Statutes support the position of Gigglebugs, the Public Advocate and Clean Energy. 26 Del. C. §402 provides that "[a]ll bills presented by and on behalf of all public utilities providing . . . electric light, heat, power . . . based on meter readings shall, before being honored, show the previous and current meter readings." Additionally, 26 Del. C. §

²⁷ Exhibits 4-5; Delmarva Brief, pp. 6, 9.

²⁸ Tr. 30:11-31:10; 37:10-20. 40; 24-42:13; 43:14-44:5; Exh 4.

²⁹ Tr. 30:11-31:10; 37:10-20.

³⁰ Tr. - 37.

³¹ Delmarva Power Brief, p.3: (*citing* Tr.-7, 16-17, 20-21).

³² Tr.-23.

1011(a)(3) further requires that “[c]ustomer bills shall contain sufficient detail to enable the customer to determine the basis of all charges.”

13. “It is well settled that “[s]tatutory language, where possible, should be accorded its plain meaning. Moreover, when a statute is clear and unambiguous, there is no need for statutory interpretation.” E.g., Sostre v. Swift, 603 A.2d 809, 813 (Del. 1992)(citations omitted)

14. As argued by the Public Advocate, “[c]learly, the General Assembly wanted public utility customers to know what meter readings (which reflect usage) they were being billed for *before* being required to pay a bill for public utility service. Delmarva's bills to GiggleBugs do show its previous and current meter readings - that is, its "usage." But, under Delmarva's interpretation of "usage," GiggleBugs was not being billed for the "usage" reflected by the meter readings published on its bills. Rather, it was being billed for its "draw," which was not shown anywhere on its bills and which in any case was not its actual "usage." (Indeed, Delmarva witness Normand called the draw “gross usage.”³³ (emphasis in original) Thus, I find Delmarva Power’s billing violates the two (2) above-referenced Delaware Statutes.

15. I also find that Delmarva Power’s Tariff unambiguously requires it to bill Gigglebugs for its “use” at its learning facility, not its “draw.” In interpreting a utility tariff, both the language and any Commission Order(s) addressing the tariff must be examined. Georgia-Pacific v. Delmarva Power & Light Company, 1992 WL 396307 (DE. Chan. 1992) (unpublished opinion) In this case, when Delmarva Power’s former Counsel was involved, I requested that the parties provide me with any relevant Commission Order and was provided none by any party. Therefore, I must solely rely upon the language of this tariff in the same way a contract is interpreted. Woloshin v. Diamond State Tel. Co., 380 A.2d 982, 984 (Del. Ch. 1977).

³³ Public Advocate Brief, p.6 (*citing* Norman testimony,-Tr.82).

16. In interpreting such a tariff, “Delaware adheres to the ‘objective’ theory of contracts, i.e. a contract’s construction should be that which would be understood by an objective, “reasonable third party.”³⁴ “When a contract is “clear and unambiguous,” courts give effect to the “plain meaning of the contract’s terms and provisions.”³⁵

17. According to the Public Advocate, it “introduced into evidence and without objection the online Merriam-Webster Dictionary definitions of “usage” and “draw.” Nowhere in the definition of “usage” does the word “draw” appear, and nowhere in the many definitions of “draw” does the word “usage” appear. Similarly, the DPA introduced into evidence and without objection synonyms for “usage,” and the word “draw” is not identified as a synonym.”³⁶

18. The DPA further argues that “Delmarva's Rider [Net Energy Metering] NEM tariff provides that NEM customers' “monthly rates, rate components, and billing unit provisions shall be those as stated under the Customer's applicable Service Classification,”³⁷ and Delmarva's SGS-ND and MGS-S tariff provisions determine customer eligibility based on monthly kWh “usage”³⁸ Nowhere in any of these tariffs does the word “draw” appear.”³⁹

19. Finally, I agree with the Public Advocate that “the ordinary meaning of “usage” (as used in the tariff) is not the equivalent of the ordinary meaning of “draw” (which is not used in the tariff) is simply common sense. Rider NEM customers that generate electricity from solar panels are using that generation to satisfy their electricity requirements, and only when they cannot generate their own electricity are they using electricity furnished by Delmarva. Indeed, Delmarva

³⁴ Clean Energy Brief, p. 4. (*citing* Estate of Osborn v. Kemp, 991 A.2d 1153, 1159 (Del. 2010) (add'l citation omitted))

³⁵ *Id.* (add'l citation omitted)

³⁶ Public Advocate Brief, p.8 (*citing* Exh. 12)

³⁷ Public Advocate Brief, p.8 (*citing* Exh. 14)

³⁸ Public Advocate Brief, p.8 (*citing* Exhs. 8,9)

³⁹ Public Advocate Brief, p.8.

witness Normand agreed that during certain periods net metering customers are either reducing the amount they are drawing off the system (that is, generating their own electricity for their own use) or even adding additional energy back to the grid.⁴⁰ Thus, net metering customers are not using electricity during those times; they are only using electricity when their own generation is insufficient to satisfy their own requirements.”⁴¹

20. “That common-sense interpretation of "usage" - the term used in the tariff that Delmarva drafted - is reinforced by the bills that GiggieBugs received from Delmarva. As discussed previously, GiggieBugs' bills only showed his usage for the billing period. They did not show [its] draw.”⁴²

21. “Finally, adopting Delmarva's interpretation would mean that "usage" has one meaning for non-net metering customers, but has another meaning for net metering customers. For non-net metering customers, "usage" would mean the actual number of kWhs that the customer uses. But for net metering customers, "usage" would mean the number of kWhs the customer draws from the system even though that customer did not actually use the number of kWh drawn from the system. In the absence of any indication that the same term should have different meanings for different classes of customers, the DPA respectfully submits that Delmarva's contention that "usage" means "draw" for net metering customers should be rejected.”⁴³

22. Alternatively, if the Commission determines that this tariff may reasonably be interpreted in two or more ways, then the tariff is ambiguous. Estate of Osborn v. Kemp, 991 A.2d 1153, 1159 (Del. 2010). An ambiguous tariff is construed against its drafter, in this case, Delmarva Power, and in favor of Giggiebugs. (*Id.* at 1160.) In its Brief, the Public Advocate persuasively

⁴⁰ Tr.-.83-84

⁴¹ Public Advocate Brief, p.9.

⁴² Public Advocate Brief, p.9.

⁴³ Public Advocate Brief, pp. 9-10

argues that Delmarva Power could have clearly drafted this tariff employing and defining different terms, for example, gross usage and net usage, which illustrate the difference between the amount of energy a solar net metering customer who obtains credits for generation draws from Delmarva's system and the resulting assignment to a rate classification (gross usage), as opposed to the customer's own energy use (net usage).⁴⁴ But as the Public Advocate briefed, "Until Delmarva Power does so, usage means the customer's actual usage."⁴⁵

23. However, despite its vigorous and persuasive arguments that this tariff be invalidated, even the Public Advocate seemingly concedes that Delmarva Power should be permitted to amend this Tariff.⁴⁶

V. RECOMMENDATIONS

24. I incorporate Section III and IV above as my Findings of Fact.

25. I recommend that, according to the current SGS-ND tariff, the Commission find that "usage" for a commercial net metering customer means their actual usage, not their "draw," "gross usage," or "total usage" as argued or maintained by Delmarva Power.

26. I recommend that the Commission permit Delmarva Power to file a revised SGS-ND tariff for Commission approval. If Delmarva needs to also amend its Net Metering tariff, it may do so.

27. I recommend that the Commission accept Delmarva Power's offer to provide GiggleBugs new equipment free of charge which reflects GiggleBugs' actual monthly usage, as well as its "draw," "gross usage," or "total usage."

⁴⁴ Public Advocate Brief, p.11.

⁴⁵ *Id.* at 40.

⁴⁶ Public Advocate Brief, p.11.

28. A proposed Commission Order is attached as Exhibit "A."

Respectfully Submitted,



Mark Lawrence
Senior Hearing Examiner

EXHIBIT "A"

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE FORMAL COMPLAINT)
OF RICHARD SPINKS DBA GIGGLEBUGS, LLC)
AGAINST DELMARVA POWER & LIGHT) PSC DOCKET NO. 18-1194
COMPANY REGARDING THE DETERMINATION)
OF A TARIFF RATE CATEGORY)
(Filed November 8, 2018))

ORDER NO. _____

AND NOW, this ____ day of _____, 2019

WHEREAS, the Commission has received and considered the Findings and Recommendations of the Hearing Examiner, which are attached hereto as Attachment "A", issued in the above-captioned Docket, which was submitted after an evidentiary hearing and briefing from the parties; and;

WHEREAS, the Commission having considered the Findings and Recommendations and the Briefs at its regularly-scheduled meeting on -----, 2019;

NOW, THEREFORE, BY THE AFFIRMATIVE VOTE OF NO FEWER THAN THREE COMMISSIONERS, IT IS HEREBY ORDERED:

That we adopt the Findings and Recommendations of the Hearing Examiner.

1. According to Delmarva Power's current SGS-ND Tariff, the Commission finds that "usage" for a commercial net metering customer means their actual usage.

2. Delmarva Power may file revised its current SGS-ND tariff and set the matter before the Commission for approval. If Delmarva needs to also amend its Net Metering tariff, it may do so.

3. The Commission accepts Delmarva Power's offer to provide GiggieBugs new equipment free of charge which reflects GiggieBugs' actual monthly usage, as well as its "draw," "gross usage," or "total usage."

4. The Commission retains the jurisdiction and authority to enter such further orders in this Docket as may be deemed just and reasonable.

BY ORDER OF THE COMMISSION:

Chair

Commissioner

Commissioner

Commissioner

Commissioner

ATTEST

Secretary